No. 83-546

IN THE

Supreme Court of the United States

October Term, 1983

CLAYCO PETROLEUM CORPORATION AND BRUCE CLAYMAN

Petitioners,

vs.

OCCIDENTAL PETROLEUM CORPORATION, OCCIDENTAL OF UMM AL QAYWAYN, INC. AND ARMAND HAMMER

Respondents.

On Petition For Writ of Certiorari to The United States Court of Appeals For the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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December 2, 1983

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QUESTIONS PRESENTED

1. Did the Ninth Circuit render a decision in conflict with applicable decisions of this Court by holding that the Act of State doctrine precludes adjudication of whether the Ruler of Umm al Qaywayn awarded a concession for exploitation of that sheikdom's oil resources as a consequence of bribes delivered to his oil minister?

2. Did the Ninth Circuit render a decision in conflict with a decision of the Fifth Circuit by holding that the Act of State doctrine precludes adjudication of whether the Ruler of Umm al Qaywayn awarded a concession for exploitation of that sheikdom's oil resources as a consequence of bribes delivered to his oil minister?

3. Does the Ninth Circuit's conclusion that the Foreign Corrupt Practices Act does not create an exception to the Act of State doctrine in private actions imperiling the conduct of this country's foreign policy present an important question of federal law that should be settled by this Court?

4. Does the Ninth Circuit's conclusion that the granting of an oil concession by the Ruler of Umm al Qaywayn was a sovereign act rather than a commercial transaction present an important question of federal law that should be settled by this Court?

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COUNTERSTATEMENT OF THE CASE

Because the trial court dismissed this case for failure to state a claim upon which relief can be granted, on review the averments of the complaint must be accepted as true. Petitioners' summary of those averments (Petition at 3-4) fails to mention that the actions of the Ruler of Umm al Qaywayn, Sheikh Ahmed al Mualla ("Sheikh Ahmed"), and not merely those of his son Sheikh Sultan, the oil minister, are necessarily questioned by the complaint. The complaint, Appendix F

hereto,* avers that petitioners negotiated directly with the Ruler for the oil concession (App. F ¶ 11); that the Ruler promised petitioners the concession (App. F ¶ 12); that the Ruler later granted the concession instead to respondents (App. F ¶ 13); and that the purpose and effect of the alleged payments were to induce the oil minister *and* the Ruler to give the concession to respondents (App. F ¶ 14).**

REASONS FOR DENYING THE WRIT

I. THE NINTH CIRCUIT'S DECISION APPLYING THE ACT OF STATE DOCTRINE IN THIS CASE IS CONSISTENT WITH THE DECISIONS OF THIS COURT.

The Act of State doctrine prevents a court of this country from questioning the official actions of a foreign sovereign. *Underhill v. Hernandez*, 168 U.S. 250 (1897). Its purpose is to avoid the courts' entertaining cases which would "imperil

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* The appendices hereto are designated Appendix F and G to continue the format begun in the Petition.

** Rule 28.1 Listing.

Occidental Petroleum Corporation has the following subsidiaries (except wholly owned subsidiaries) and affiliates: Beatrice Pocahontas Company; C-D Development Corporation; Canadian Occidental Petroleum Ltd.; Cansulex Limited; Citco Union Texas Petroleo Do Brasil Ltda.; Clam Petroleum Company; Cold Springs Pipeline Company; Coltexo Corporation; Cynthia Gas Gathering Company Limited; Direccion Oxy, S.A. de C.V.; Dixie Pipeline Company; East Texas Salt Water Disposal Company; Eko Hotels Limited; Enoxy Coal, Inc.; Hispano Inversion, S.A.; Hooker Denkai Co., Ltd.; Industria Quinica De Portuguesa, S.A.; International Ore & Fertilizer Begium, S.A.; Key Pipe Line Co., Ltd.; Malharia Industrial Do Nordeste S.A.; Mississippi Chemical Corporation; Northward Developments Ltd.; Numinter Limited; Nunival S.A.; Oxy Metal Industries (France) S.A.; Petrogas Processing Ltd.; Petway Products Distributors, Inc.; Plasticos & Derivados Compania Anonima; Plastiflex, C.A.; Quimica Hooker S.A.; Rail to Water Transfer Corporation; Rose Creek Vangorda Mines Limited; Starbar de Mexico S.A. de C.V.; Sultran Limited; Sumdum Development Corporation; Sumitomo Durez Co., Ltd.; Symcrude Canada Ltd.; The Southland Corporation; Tororo Industrial Chemicals and Fertilizers Limited; and Trans-Jeff Chemical Corporation.

Occidental of Umm al Qaywayn, Inc.'s parent company is Occidental Exploration and Production Company.

the amicable relations between governments and vex the peace of nations." *Oetjen v. Central Leather Co.*, 246 U.S. 297, 304 (1918). The Act of State doctrine "requires only that, when it is made to appear that the foreign government has acted in a given way on the subject-matter of the litigation, the details of such action or the merit of the result cannot be questioned but must be accepted by our courts as a rule for their decision." *Ricaud v. American Metal Co.*, 246 U.S. 304, 309 (1918). The doctrine rests "upon the highest considerations of international comity and expediency." *Oetjen v. Central Leather Co.*, supra, 246 U.S. at 303-04.

Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), is the most comprehensive modern restatement of the Act of State doctrine. This Court concluded that the doctrine has constitutional underpinnings and is based on the separation of powers, which places primary responsibility for conducting foreign affairs in the executive branch. Since *Sabbatino*, the most important factor in determining whether the Act of State doctrine requires dismissal of a case is the likelihood that its adjudication would interfere with this country's foreign relations. This test has guided every significant decision applying the Act of State doctrine since *Sabbatino*. The Ninth Circuit below, relying on *Sabbatino*, likewise reasoned that "the critical element [in determining whether a case must be dismissed under the Act of State doctrine] is the potential for interference with our foreign relations." 712 F.2d at 406; App. A at 10.

Applying this test, the Ninth Circuit analyzed petitioners' complaint to determine its potential for interference with this country's foreign relations. It properly identified the governmental act underlying petitioners' complaint as the Ruler's award to defendants of an oil concession in Umm al Qaywayn,[1] and found that petitioners' claim required scrutiny of that "sovereign decision authorizing

[1] Petitioners' brief creates confusion by seeming to suggest that the only "act" necessarily scrutinized by their case is the Petroleum Minister's allegedly accepting bribes in Europe. Petition at 17-18. Later in the same paragraph, however, petitioners acknowledge that the state act involved in the case is the Ruler's award to

exploitation of important national resources." 712 F.2d at 407; App. A at 14.[2] Petitioners have conceded as much; in their brief on appeal, petitioners advised the Ninth Circuit that "admittedly, to establish their damages, plaintiffs must demonstrate that but for defendants' anticompetitive conduct, Umm al Qaywayn would have awarded the controversial concession to plaintiffs." Appellants' Opening Brief at 27. The Ninth Circuit therefore correctly concluded that petitioners' complaint required finding that the sovereign's conduct was induced by bribery (712 F.2d at 407; App. A at 16), a conclusion which petitioners have not disputed.

Both the district court and the Ninth Circuit found that these aspects of petitioners' case demonstrated its potential for interference with this country's foreign relations. The Ninth Circuit cited *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977); *International Association of Machinists & Aerospace Workers v. Organization of Petroleum Exporting Countries*, 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982); and *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92 (C.D. Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972), each of which held that the Act of State doctrine required dismissal of a case questioning the acts of Middle Eastern and other OPEC governments regarding their oil resources. The court held that a case which

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respondents of the concession in Umm al Qaywayn. Petitioners are correct the second time: it is not the alleged acceptance of bribes in England and Switzerland, but rather the Ruler's award of the concession that is the Act of State at issue here. Unquestionably, the grant of the Umm al Qaywayn oil concession was a governmental act "done within its own territory." *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).

[2] At one point in their brief petitioners seem to dispute that Umm al Qaywayn is the type of foreign entity to which the Act of State doctrine applies. *See* Petition at 17. However, petitioners offer no authority to contradict the Ninth Circuit's holding in *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972), relied on in this case, that it is such an entity. *See* 712 F.2d at 405, n. 1; App. A at 4-5. *See also Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum*, 577 F.2d 1196 (5th Cir. 1978), *cert. denied*, 442 U.S. 928 (1979).

necessarily questioned a foreign sovereign's decision in this area called for Act of State preclusion, since:

> "[I]t is clear that judicial scrutiny of sovereign decisions allocating the benefits of oil development would embarrass the political branches of our government in the conduct of foreign policy." 712 F.2d at 407; App. A at 14.

The court further held that petitioners' proposed proof of bribery would also interfere with foreign relations: "[T]he very existence of plaintiffs' claim depends upon establishing that the motivation for the sovereign act was bribery, thus embarrassment would result from adjudication." 712 F.2d at 407; App. A at 16. The Ninth Circuit's analysis of the Act of State issues thus followed this Court's guidance in *Sabbatino* to analyze carefully foreign relations impacts.

Petitioners' argument that the Ninth Circuit's decision herein conflicts with decisions of this Court relies primarily on *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962). Petition at 14-16. But that case, which predates *Sabbatino* in any event, is not an Act of State case: it contains no mention whatever of the Act of State doctrine. The Court's discussion quoted by petitioners (Petition at 15) related solely to the question whether defendants' conduct was shielded from the federal antitrust laws by *Parker v. Brown*, 317 U.S. 341 (1943) on the grounds that it was required by governmental regulations. Moreover, *Continental Ore* is distinguishable on its facts. This Court found that the anticompetitive acts alleged in that case had been committed entirely by a private party exercising discretionary powers granted it by the Canadian government, and that there was "no indication that the Controller or any other official within the structure of the Canadian Government approved or would have approved of [the anticompetitive acts]." 370 U.S. at 706. For this reason the Second Circuit has characterized *Continental Ore* as a case in which "no act of the sovereign was involved." *Hunt v. Mobil Oil Corp., supra,* 550 F.2d at 75. *Continental Ore* cannot be likened to the case at bar, in which a foreign

sovereign Ruler's own decision and the motives behind it are directly questioned.

Petitioners raise a number of other arguments to contest the holdings below that this case must be dismissed under the Act of State doctrine. None is persuasive.

First, petitioners claim that *Sabbatino* limits application of the doctrine to cases where the "validity" of the foreign sovereign's act is challenged. Petition at 16-17. But in *Sabbatino*, where the validity of an expropriation *was* challenged, this Court expressly declined "laying down or reaffirming an inflexible and all-encompassing rule" defining the circumstances in which the doctrine would apply. 376 U.S. at 428. The Court's references to "validity" do not purport to state a limitation on the circumstances in which the doctrine must be applied, and cannot fairly be construed as doing so. In fact, *Underhill v. Hernandez*, *supra*, this Court's landmark case in which the Act of State doctrine was first applied, was not an expropriation case and no challenge was made to the "validity" of the foreign sovereign's actions.

Second, petitioners argue that they do not assert any claim against Sultan or other Umm al Qaywayn officials and imply that this avoids the doctrine. Petition at 8, 15. However, there is no authority that petitioners' omission of Umm al Qaywayn or its officials as parties defendant renders the doctrine inapplicable. Many cases have been dismissed under the Act of State doctrine where neither the foreign governments whose acts were in issue nor any of their officials were named as defendants. *See, e.g., Oetjen v. Central Leather Co., supra; Ricaud v. American Metal Co., supra; American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909); *Hunt v. Mobil Oil Corp., supra; General Aircraft Corp v. Air America, Inc.*, 482 F. Supp. 3 (D.D.C. 1979); *Bokkelen v. Grumman Aerospace Corp.*, 432 F. Supp. 329 (E.D.N.Y. 1977); and *Occidental Petroleum Corp. v. Buttes Gas & Oil Co., supra.* As the court in *Occidental v. Buttes* put it: "[P]laintiffs necessarily ask this court to 'sit in judgment'

upon the sovereign acts pleaded, whether or not the countries involved are considered co-conspirators." 331 F.Supp. at 110. *See also* Justice Marshall's dissenting opinion in *Alfred Dunhill of London, Inc. v. Republic of Cuba,* 425 U.S. 682 (1976), calling the Act of State doctrine "[e]qually applicable whether a sovereign nation is a party or not . . . ." 425 U.S. at 726.

Third, petitioners argue that because the details of the alleged bribery have already been revealed publicly, no foreign relations impact will result from adjudication of their case. Petition at 18-19. This argument was made below and was properly rejected by the Ninth Circuit. The court reviewed and summarized the facts set forth in the newspaper article and in the Payments Report,[3] 712 F.2d at 405; App. A at 4-7, and concluded that they "disclose only some of the underlying facts and only raise a question as to the legality of some of the payments under Umm al Qaywayn law. *There was no inquiry into the reasons for the granting of the concession.*" 712 F.2d at 409, n. 6; App. A at 23 (emphasis added). Petitioners offer nothing which disputes this conclusion nor do they present any reason why this Court should review that factual determination.

[3] Although the "Payments Report" cited by petitioners (Petition at 5, 6) was not part of the record herein, respondents did not object to the Ninth Circuit's reviewing it, and therefore provided copies to the court at oral argument.

II. THE NINTH CIRCUIT'S DECISION IN THIS CASE DOES NOT CONFLICT WITH THE FIFTH CIRCUIT'S DECISION IN THE *MITSUI* CASE.

Petitioners claim that the Ninth Circuit's decision in this case conflicts with a decision of the Fifth Circuit, *Industrial Investment Development Corp. v. Mitsui & Co.*, 594 F.2d 48 (5th Cir. 1979), *reh. denied*, 599 F.2d 449 (1979), *cert. denied*, 445 U.S. 903 (1980). Petition at 9-13. Petitioners' claim of inconsistency is based on language in *Mitsui* to the effect that cases challenging the "validity" of a foreign sovereign's action are of greater Act of State concern than cases questioning the "motivation" behind such action. 594 F.2d at 55.

But whether validity and motivation are equally protected is beside the point. Inquiries into a sovereign's motivation *are* protected by the Act of State doctrine where such inquiries would embarrass foreign relations, and nothing in the *Mitsui* opinion holds otherwise. The Fifth Circuit did not hold that cases involving a sovereign's motivation necessarily avoided the Act of State doctrine, as petitioners suggest; *Mitsui* states only that such cases might avoid the doctrine *if* they raise no foreign relations concerns. In the very language quoted by petitioners, the *Mitsui* opinion reasoned that:

> "Precluding all inquiry into the motivation behind or circumstances surrounding the sovereign act would uselessly thwart legitimate American goals *where adjudication would result in no embarrassment to executive department action.*" 594 F.2d at 55 (emphasis added).

Both the district court and the Ninth Circuit held below that the inquiry into foreign sovereign motives required by the case at bar *would* embarrass the executive branch's conduct of foreign affairs. Petitioners offer no reason why this Court should review that determination. The language from *Mitsui* cited by petitioners therefore *supports* dismissal of this case. Indeed, the Ninth Circuit considered and relied on the Fifth Circuit's *Mitsui* opinion

in dismissing petitioners' claims below. 712 F.2d at 407; App. A at 15-16.

Mitsui and the Ninth Circuit decision below are consistent. In *Mitsui*, the plaintiffs were an American company and related foreign entities which had sought to conduct logging operations in Indonesia. Because Indonesian government regulations required foreign companies to have a local partner, plaintiffs formed a joint venture with an Indonesian company. Defendants, to forestall plaintiffs' competition, allegedly sponsored a dissident shareholder group which seized control of plaintiffs' Indonesian partner and caused it to renounce the joint venture. Plaintiffs thereby lost their right to do business in Indonesia under its government regulations and sued under the antitrust laws.

Defendants in *Mitsui* sought dismissal under the Act of State doctrine, arguing that it was the Indonesian government's failure to allow plaintiffs to do business there that caused plaintiffs' harm. The Fifth Circuit Court of Appeals disagreed. It reasoned that the Indonesian government regulations were merely background for the wrongful acts alleged (the takeover of plaintiffs' partner). The Indonesian government's neutral application of its regulations, that sovereign's "only connection" with the case, 594 F.2d at 54, was not the type of sovereign policy decision requiring application of the Act of State doctrine: "[A] stage fortuitously set by existing foreign legislation cannot automatically be invoked to shield conspiracies to restrain United States trade." *Id* at 53. The Act of State doctrine therefore did not require dismissal of the case.

Indeed, the Fifth Circuit acknowledged in *Mitsui* that a case like the instant one would require application of the doctrine. The *Mitsui* opinion discussed *Hunt v. Mobil Oil Corp., supra*, in which plaintiff pleaded that seven oil companies had maneuvered it into a position which resulted in Libya's expropriating its oil concessions. The court quoted the Second Circuit's description of the foreign relations concerns raised by such a case: "The action taken

here is obviously only an isolated act in a continuing and broadened confrontation between the East and West in an oil crisis which has implications and complications far transcending those suggested by appellants." 594 F.2d at 55, n. 11. Referring to that quotation, the Fifth Circuit contrasted *Hunt*'s foreign policy implications with those in the case before it: "No such 'implications and complications' hinder a resolution of Industrial Investment's antitrust claims here." *Id.* The Fifth Circuit thus recognized that cases turning on a determination by the government of an oil producing country as to which private companies should be permitted to own oil concessions in their sovereign territory, as this case does, raise more serious foreign relations concerns than did the case before it.

Mitsui likewise distinguished the foreign relations concerns present in *Occidental Petroleum Corp. v. Buttes Gas & Oil Co., supra,* a case which involved the same oil concession as is in issue here. *Mitsui* explained that *Occidental*, unlike the case before it, was a case "where plaintiffs' asserted claim arose through rights granted by a foreign government. . . ." 594 F.2d at 54. It further distinguished *Occidental* as requiring an American court to set an "ethical standard . . . by which the propriety of [the government's] decision is tested," a matter which raised serious foreign relations concerns. *Id.* at 55. The allegations in the instant case are like those in *Occidental v. Buttes*, and unlike those in *Mitsui:* petitioners' alleged claims for relief arose through rights granted by a foreign government, and would require proof of bribery presenting ethical questions offensive to foreign governments and embarrassing to American foreign policy.

Petitioners further suggest, based on other language from *Mitsui*, that their case avoids the doctrine because only their damages require proof of the Ruler's reasons for awarding the concession to Occidental. Petition at 11. The plaintiffs in *Mitsui*, however, were in a different position than petitioners here. Plaintiffs in *Mitsui* claimed damages not only from the loss of the license from the Indonesian government, but *also* from certain of defendants' acts which directly caused them

losses apart from any involvement of the Indonesian government. The Act of State doctrine was completely irrelevant to the latter portion of their claim. Therefore, even if the Act of State doctrine had been applicable to bar part of plaintiffs' case in *Mitsui*, it would have affected only the *amount* of damage and would not have required dismissal of plaintiffs' entire case. As the court in *Mitsui* stated:

> "[I]nquiry beyond the fact of some damage flowing from the unlawful conspiracy relates only to the amount and not the fact of damage . . . Surely the limited nature and effect of determining the proportional cause of plaintiffs' damage allocable to defendants' conduct does not trigger the type of special political considerations protected by the act of state doctrine." 594 F.2d at 55.

The case at bar is entirely different from *Mitsui* from that perspective. Petitioners here can state no claim for relief unless they prove that the Ruler awarded the concession to Occidental as a consequence of the alleged bribes about which they complain. Petitioners have never claimed in this case that any acts of respondents directly caused them damage independent of that caused by the government of Umm al Qaywayn in denying them the concession. In the words of the *Mitsui* court, determining the motivation of the Ruler in the within case is necessary for establishing the fact of damage, not merely the amount.

The Ninth Circuit expressly recognized the differences between *Mitsui* and this case when discussing the *Mitsui* opinion:

> "Appellants also argue that the examination of foreign governmental action which this case requires is not intrusive enough to warrant an act of state defense because the concern here is the motivation behind the sovereign's act, rather than its legal validity. Appellants rely principally on the Fifth Circuit's statement that motivation and validity are not

"equally protected by the act of state doctrine." *Industrial Investment Development Corp. v. Mitsui*, 594 F.2d at 55. That opinion does not foreclose application of the act of state doctrine to cases where motivation but not validity must be scrutinized. Rather, *Mitsui* holds that where the motivation for the sovereign act would be subject to a limited examination in order to measure the plaintiff's damages, and the adjudication 'would result in no embarrassment to executive department action,' inquiry is not foreclosed by the act of state doctrine." 712 F.2d at 407; App.A at 14-15.

In short, the Ninth Circuit decision herein and the *Mitsui* case are consistent.

III. THE NINTH CIRCUIT'S CONCLUSION THAT THE FOREIGN CORRUPT PRACTICES ACT DOES NOT CREATE AN EXCEPTION TO THE ACT OF STATE DOCTRINE IN PRIVATE SUITS DOES NOT PRESENT AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE REVIEWED BY THIS COURT.

Petitioners' argument that the Foreign Corrupt Practices Act, Pub. L. 95-213, 91 Stat. 1494 (Dec. 19, 1977), 15 U.S.C. §§ 78dd-1 et seq. ("FCPA"), somehow creates an exception to the Act of State doctrine in private lawsuits (Petition at 20-24) was likewise strenuously argued to the Ninth Circuit. The court's opinion reflects a thorough consideration of the legislative history of the FCPA.

The Ninth Circuit found that the FCPA "represents a legislative judgment that our foreign relations will be bettered by a strict anti-bribery statute." 712 F.2d at 408; App. A at 21. Petitioners conclude from that fact too easily, however, that Congress intended to abrogate the Act of State doctrine in private lawsuits alleging bribery of foreign officials. Petition at 22-23. The Ninth Circuit found that Congress was aware that "prosecution under the Act entails risks to our relations with the foreign governments involved . . .," 712 F.2d at 408; App. A at 21,

and so confined enforcement authority to the Justice Department and the SEC, which "coordinate enforcement of the Act with the State Department, recognizing the potential foreign policy problems of these actions." *Id.* at 409; App. A at 22.[4]

The Ninth Circuit therefore concluded that the FCPA and the Act of State doctrine were complementary, not inconsistent as petitioners argue. In an FCPA enforcement action brought by government prosecutors, the foreign policy ramifications of the proposed action have been considered and accommodated: "[A]ny governmental enforcement represents a judgment on the wisdom of bringing a proceeding, in light of the exigencies of foreign affairs. Act of State concerns are thus inapplicable. . . ." 712 F.2d at 409; App. A at 23. The court contrasted this situation with a private action raising bribery allegations. In a private action, the Act of State doctrine provides the sole assurance that the courts will avoid interfering in foreign policy matters: "It is the screening of governmental proceedings, with State Department consultation, which distinguishes FCPA enforcement from private suits. [citation omitted] Hence, in private suits, the act of state doctrine remains necessary to protect the proper conduct of national foreign policy." *Id.;* App. A at 24.

Petitioners overlook this crucial distinction in claiming license to pursue a private action, oblivious to its impact on foreign policy. *Sabbatino* taught that it is the political branches of our federal government, not the courts or private corporations, which are given the constitutional charter to conduct foreign policy. Just as the FCPA was intended to stop U.S. corporations from interfering with U.S. foreign relations through their business overseas, the Act of State doctrine likewise prevents private parties

[4] In addition to the legislative history, respondents submitted to the Ninth Circuit a letter from the Department of State describing its practice of consulting with the Justice Department and the SEC on the foreign relations issues involved in proposed FCPA enforcement actions. That letter, along with respondents' inquiry to the Department of State, are submitted herewith as Appendix G.

from interfering with foreign relations through the courts of this country.

Petitioners' arguments well demonstrate the danger of abrogating the doctrine. Admitting that the claim it seeks to try and have determined in the district court "does not speak highly of the Umm al Qaywayn oil minister," (Petition at 19) they nevertheless ask for the foreign policy implications of their action to be ignored; they argue that the courts "must presume that Umm al Qaywayn abhors bribery and approves of the efforts of the United States to prevent it, and would only support [such] efforts. . . ." Petition at 27. But regardless of the ethical concepts which prevail in the foreign country, a trial in absentia in an American court of the integrity of a sovereign ruler is bound to touch a raw nerve, especially when the court's findings will be based on evidence selected by private litigants for their own partisan purposes. *See International Association of Machinists & Aerospace Workers v. Organization of Petroleum Exporting Countries, supra.* Petitioners, in urging the court to entertain their claim by adopting a presumption that the foreign government would approve, ignore the separation of powers principles underlying the Act of State doctrine and the need for judicial forbearance in matters affecting United States foreign relations.

The Ninth Circuit also properly rejected Petitioners' asserted "corruption exception" to the Act of State doctrine as lacking any truly supportive authority. 712 F.2d at 408; App. A at 19-20. Petitioners rely on *Dominicus Americana Bohio v. Gulf & Western Industries, Inc.*, 473 F. Supp. 680, 689-690 (S.D.N.Y. 1979), where the District Court referred cryptically to such an exception as an alternative holding on the purported authority of *Hunt v. Mobil Oil Corp., supra.* But in *Hunt*, the Second Circuit expressly declined to consider the question, stating that the case before it was "not the proper vehicle for consideration of international commercial bribery in so far as it affects the act of state doctrine." 550 F.2d at 79.

Petitioner's reliance on *Jimenez v. Aristeguieta*, 311 F.2d 547 (5th Cir. 1962), *cert. denied*, 373 U.S. 914, *reh. denied*, 374 U.S. 858 (1963), a case predating *Sabbatino*, is similarly misplaced. In that case, the court merely applied the terms of an extradition treaty with Venezuela with the blessing of the State Department and at the behest of the Venezuelan Government, to permit Venezuela to prosecute a former government official. The court's holding that the Act of State doctrine did not bar the action therefore correctly anticipated the foreign relations foundations of the doctrine later announced in *Sabbatino*, since both governments affected by the action desired its prosecution. Moreover, *Sabbatino* held that the Act of State doctrine was applicable only in the absence of a treaty. 376 U.S. at 428. The court's statement that common crimes committed by a foreign government official are not Acts of State which could avoid his extradition and prosecution, relied on by petitioners (Petition at 25), is beside the point here for an additional reason: as discussed above, the Act of State in the instant case is the granting of the concession, not the alleged acceptance of bribes.

Nor can the existence of a "corruption exception" to the Act of State doctrine be supported by *Sage International, Ltd. v. Cadillac Gage Co.*, 534 F. Supp. 896 (E.D. Mich. 1981). The court in *Sage* held that the Act of State doctrine did not bar plaintiffs' complaint, because only the purchasing decisions of sales agents utilized by foreign governments, not any acts of a foreign sovereign, were at issue, and because the alleged wrongful conduct related principally to the domestic actions of the defendant. The court expressly declined to decide whether allegations of corruption would avoid the Act of State doctrine, because no such allegations were made in that case. The court concluded that "final resolution of whether, if allegations of corruption were made, the Act of State Doctrine could be avoided is not necessary at this time." 534 F. Supp. at 910. The Ninth Circuit thus properly recognized below that the district court's language in *Sage* on which petitioners rely

(Petition at 25) was mere *dictum.* 712 F.2d at 408, n.3; App. A at 19-20.

Finally, petitioners cite two other cases, *Habib v. Raytheon Co.,* 616 F.2d 1204 (D.C. Cir. 1980) and *Sedco International, S.A. v. Cory,* 522 F.Supp. 254 (S.D. Iowa 1981), *aff'd,* 683 F.2d 1201 (8th Cir.), *cert. denied,* 103 S.Ct 379 (1982), to illustrate that "courts have heard a variety of claims involving foreign bribery." Petition at 26. Neither case is on point. While the D.C. Circuit did observe in *dictum* in *Habib* that illegal payments might be an issue at trial of that case, and while the district court in *Sedco* evidently did hear evidence of bribery, there is no indication that the parties raised the Act of State doctrine in either case or that the courts considered whether the doctrine might apply. Neither opinion makes any reference to the Act of State doctrine. These cases therefore cannot be used as authorities on whether the doctrine requires dismissal of a case in which it has been properly raised, as defendants did in this case.

The Ninth Circuit was thus correct that there is no truly supportive authority for a "corruption exception" to the Act of State doctrine.

IV. BECAUSE THIS CASE CONCERNS SOVEREIGN ACTIONS, CERTIORARI TO CONSIDER A COMMERCIAL EXCEPTION TO THE ACT OF STATE DOCTRINE IS NOT WARRANTED.

Petitioners argue that a commercial exception to the Act of State doctrine avoids its application in this case. Petition at 27-33. While the existence of such a commercial exception is problematical,[5] that issue is not presented by this case. The Ninth Circuit saw no reason to reach the

[5] Neither in *Alfred Dunhill of London, Inc. v. Republic of Cuba, supra,* nor in any other Supreme Court case has a majority of the Court recognized a "commercial exception" to the Act of State doctrine. Four justices voted for the exception in *Dunhill,* while five did not. The purported commercial exception has not formed the basis of a holding in any case from any jurisdiction.

question since it correctly held that petitioners' case does not involve commercial conduct, but rather the exercise of power peculiar to a sovereign. 712 F.2d at 408; App. A at 18-19.

In granting a concession to explore for and extract oil in its sovereign territory, Umm al Qaywayn was not operating an oil business in anything like the sense that Cuba was operating a cigar business in the *Dunhill* case. Though the grantee of the concession was a private oil company, the grantor was the sovereign doing what only a sovereign can do — exercising dominion over its natural resources. In *United States v. California*, 332 U.S. 19, *reh. denied*, 332 U.S. 787 (1947), this Court determined that only the national government has power to grant leases to exploit offshore petroleum deposits. The Court found invalid offshore leases granted by the State of California, holding that dominion over petroleum and other mineral deposits located offshore a nation's territory but within its three-mile zone (as then claimed by the United States) necessarily lay with the national government alone. 332 U.S. at 38-39. The Ninth Circuit likewise reasoned in *International Association of Machinists & Aerospace Workers v. Organization of Petroleum Exporting Countries*, *supra*, that this country and other nations support the principle of supreme state sovereignty over natural resources, 649 F.2d at 1361, and that the sovereignty of the middle eastern oil producing nations "cannot be separated from their near total dependence on oil." *Id.* at 1358.

Thus, even if a "commercial exception" to the Act of State doctrine were recognized by this Court, the sovereign acts at issue here would not fall within it. The Ninth Circuit's decision on this point does not present any important question of federal law which should be settled by this Court.

V. CONCLUSION.

For the foregoing reasons, the Court should deny the Petition For Writ of Certiorari.

Respectfully Submitted,

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APPENDIX

APPENDIX F

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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

[illegible] PETROLEUM CORPORATION and [illegible] CLAYMAN, Plaintiffs, vs. OCCIDENTAL PETROLEUM CORPORATION OCCIDENTAL OF UMM al QUWAIN, INC. and ARMAND HAMMER, Defendants.	No. 79 03845 RMT (Kx COMPLAINT for Antitrust Violations

Plaintiffs, complaining of defendants jointly and severally, allege as follows:

JURISDICTION AND VENUE

1. This litigation arises under Section 1 of the Sherman Act [15 U.S.C. §1], Section 2(c) of the Robinson-Patman Act [15 U.S.C. §13(c)], California Business and Professions Code Section 16720, California Business and Professions Code Section 17045, and the common law.

2. This Court has jurisdiction of this litigation

(1)

pursuant to 15 U.S.C. §15, 15 U.S.C. §22, 28 U.S.C. §1331, 28 U.S.C. §1332, and the principles of pendent jurisdiction.

3. Defendants and each of them reside in, or are doing business in, the Central District of California, and the acts, omissions, practices and course of conduct, alleged herein took place in the Central District of California.

THE PARTIES

4. Plaintiff, CLAYCO PETROLEUM CORPORATION ("CLAYCO") is and was at all times relevant to this action a corporation organized and existing pursuant to the laws of the State of Delaware and having its principal place of business in the State of New York. CLAYCO is and was at all times relevant hereto engaged in interstate and foreign commerce.

5. Plaintiff, BRUCE CLAYMAN ("CLAYMAN") is and was at all times relevant to this action a citizen and resident of the State of New York.

6. Defendant, OCCIDENTAL PETROLEUM CORPORATION ("OCCIDENTAL") is and was at all times relevant to this action a corporation organized and existing pursuant to the laws of the State of California and having its principal place of business in the State of California. OCCIDENTAL is and was at all times relevant hereto engaged in interstate and foreign commerce.

7. Defendant OCCIDENTAL of UMM al QUWAIN, INC. is and was at all times relevant hereto a corporation organized and existing pursuant to the laws of the State of California

and having its principal place of business in the State of California. OCCIDENTAL of UMM al QUWAIN, INC. is and was at all times relevant hereto a wholly owned subsidiary and agent of OCCIDENTAL and engaged in interstate and foreign commerce.

8. Defendant, ARMAND HAMMER, is and was at all times relevant to this action the chief executive officer of OCCIDENTAL and a resident of the State of California.

THE CAUSE OF ACTION

9. CLAYCO was formed by CLAYMAN in June 1969, for the purpose of engaging in the acquisition, exploration, and development of interests in undeveloped oil, gas and other mineral land acreage on an international basis.

10. In August 1969, CLAYMAN learned that certain oil and gas concessions located on and off the shore of the Sheikhdoms of Ajamn, Dubai, Shatjah and Umm al Quwain, located on the Trucial Coast of the Persian Gulf, were available to be purchased.

11. In approximately August 1969, CLAYMAN and CLAYCO directly and through their agents began negotiations with Sheikh Ahmed al Mualla ("SHEIKH AHMED"), the ruler of Umm al Quwain directly and through his son Sheikh Sultan bin Ahmed Mullah ("SHEIKH SULTAN"), to acquire an off-shore oil and gas concession in the territorial waters of Umm al Quwain (hereinafter the "Concession").

12. In or about September 1969, SHEIKH AHMED agreed that CLAYMAN and CLAYCO would be awarded the Concession upon CLAYCO's submission of a bid commensurate with those previously

received by SHEIKH AHMED.

13. On or about November 19, 1969, the Concession was obtained from SHEIKH AHMED by OCCIDENTAL of UMM al QUWAIN, INC. Plaintiffs are informed and believe that this Concession had a value of One Hundred Million ($100,000,000.00) Dollars.

14. Plaintiffs are informed and believe that at or about the time the Concession was awarded to OCCIDENTAL of UMM al QUWAIN, INC.:

(a) ARMAND HAMMER delivered a secret payment of Two Hundred Seventeen Thousand ($217,000.00) Dollars to SHEIKH SULTAN in a London hotel room for the purpose of inducing him and his father to award the Concession to OCCIDENTAL of UMM al QUWAIN, INC. and not to CLAYMAN and CLAYCO;

(b) OCCIDENTAL spent approximately Thirteen Thousand ($13,000.00) Dollars to entertain SHEIKH SULTAN on two occasions in London for the purpose of inducing him and his father to award the Concession to OCCIDENTAL of UMM al QUWAIN, INC. and not to CLAYMAN and CLAYCO;

(c) An agent of OCCIDENTAL delivered an additional secret payment of Two Hundred Thousand ($200,000.00) Dollars to SHEIKH SULTAN in Switzerland for the purpose of inducing him and his father to award the Concession to OCCIDENTAL of UMM al QUWAIN, INC. rather than to CLAYMAN and CLAYCO.

15. Due to defendants fraudulent concealment of the payments described in Paragraph 14, plaintiffs were not aware

///

of those payments until on or about December 11, 1978, when newspaper accounts disclosed the existence of and nature of said payments.

FIRST CLAIM

16. Plaintiffs reallege and incorporate herein by reference each and every allegation contained in Paragraphs 1 through 15, inclusive, set forth above.

17. This First Claim is based upon Section 1 of the Sherman Act, 15 U.S.C. §1.

18. By means of the payments set forth above in Paragraph 14, defendants entered into a contract, combination, and conspiracy in restraint of foreign trade.

19. As a direct and proximate result of the wrongful conduct alleged herein, plaintiffs have been injured in their business. Therefore, plaintiffs are entitled to recover from defendants three times the damages they have sustained together with costs of suit and reasonable attorneys' fees pursuant to 15 U.S.C. §15.

SECOND CLAIM

20. Plaintiffs reallege and incorporate herein by reference each and every allegation contained in Paragraphs 1 through 15, inclusive, as set forth above.

21. This Second Claim is based upon Section 2(c) of the Robinson-Patman Act, 15 U.S.C. §13(c).

22. All of the payments referred to in Paragraph 14 were made in secret by defendants.

23. Neither SHEIKH AHMED nor SHEIKH SULTAN rendered any legitimate services to OCCIDENTAL in exchange for the aforementioned payments.

24. As a direct and proximate result of the payments described in Paragraph 14 above, plaintiffs were prevented from acquiring the Concession which plaintiffs are informed and believe had a value of One Hundred Million ($100,000,000.00) Dollars and thus, were injured in their business. Therefore, plaintiffs are entitled to recover from defendants three times the damages they have sustained together with costs of suit and reasonable attorneys' fees pursuant to 15 U.S.C. §15.

THIRD CLAIM

25. Plaintiffs reallege and incorporate herein by reference each and every allegation contained in Paragraphs 1 through 15, inclusive, as set forth above.

26. This Third Claim is based upon California Business and Professions Code Section 16720.

27. As a direct and proximate result of defendants payments to SHEIKH SULTAN as set forth in Paragraph 14 above, plaintiffs were prevented from obtaining the Concession. As a result, the acts of defendants created a restriction in trade and prevented competition in the purchase and sale of oil and gas concessions.

28. Plaintiffs are, therefore, entitled to recover from defendants three times the damages sustained by them as a result of defendants' conduct together with reasonable attorneys'

fees and costs of suit pursuant to California Business and Professions Code Section 16750.

FOURTH CLAIM

29. Plaintiffs reallege and incorporate herein by reference each and every allegation contained in Paragraphs 1 through 15, inclusive, as set forth above.

30. This Fourth Claim is based upon California Business and Professions Code Section 17045.

31. All of the payments referred to in Paragraph 14 were made in secret by defendants.

32. As a direct and proximate result of the payments referred to in Paragraph 14 above, plaintiffs were injured in that they were deprived of the opportunity to obtain the Concession. The payments also tended to destroy competition in the purchase and sale of oil and gas concessions.

33. Plaintiffs are, therefore, entitled to recover from defendants three times the damages sustained as a result of defendants' conduct together with reasonable attorneys' fees and costs of suit pursuant to California Business and Professions Code Section 17082.

FIFTH CLAIM

34. Plaintiffs reallege and incorporate herein by reference each and every allegation contained in Paragraphs 1 through 15, inclusive, as set forth above.

35. Prior to the payments referred to in Paragraph 14 above, plaintiffs and SHEIKH AHMED and SHEIKH SULTAN had a

business relationship which would probably have resulted in economic benefit to plaintiffs.

36. Plaintiffs are informed and believe that at all times relevant hereto defendants were aware of the business relationship between plaintiffs and SHEIKH AHMED and SHEIKH SULTAN

37. Plaintiffs are informed and believe that defendants made the payments to SHEIKH SULTAN set forth in Paragraph 14 to intentionally disrupt and interfere with the business relationship between plaintiffs and SHEIKH AHMED and SHEIKH SULTAN and the prospective economic advantage to be derived therefrom by plaintiff.

38. As a direct and proximate result of the payments referred to in Paragraph 14, the business relationship between plaintiffs and SHEIKH AHMED and SHEIKH SULTAN was disrupted and plaintiffs were deprived of probable economic benefits.

39. Therefore, plaintiffs are entitled to recover from defendants One Hundred Million ($100,000,000.00) Dollars.

SIXTH CLAIM

40. Plaintiffs reallege and incorporate by reference herein each and every allegation contained in paragraphs 1 through 14, inclusive, as set forth above.

41. Defendants and each of them did the things herein alleged wilfully and knowingly, maliciously and oppressively, for the purpose of damaging plaintiffs and each of them in their lawful business. In addition, the payments alleged herein were secretly and corruptly made, concealed from plaintiffs,

concealed from defendants' shareholders, concealed from defendants' auditors, and the public at large with the intent to defraud plaintiffs into believing that said concessions were obtained by defendants without benefit of said payments. Plaintiffs therefore are entitled to exemplary and punitive damages in the amount of Two Hundred Million ($200,000,000.00) Dollars.

PRAYER FOR RELIEF

42. WHEREFORE, plaintiffs pray as follows:

(a) That with respect to the First Claim, this Court award plaintiffs Three Hundred Million ($300,000,000.00) Dollars in damages, together with costs of suit and reasonable attorneys' fees;

(b) That with respect to the Second Claim, this Court award plaintiffs Three Hundred Million ($300,000,000.00) Dollars in damages, together with costs of suit and reasonable attorneys' fees;

(c) That with respect to the Third Claim, this Court award plaintiffs Three Hundred Million ($300,000,000.00) Dollars in damages, together with costs of suit and reasonable attorneys' fees;

(d) That with respect to the Fourth Claim, this Court award plaintiffs Three Hundred Million ($300,000,000.00) Dollars in damages, together with costs of suit and reasonable attorneys' fees;

(e) That with respect to the Fifth Claim, this Court award plaintiffs One Hundred Million ($100,000,000.00) Dollars

in damages;

(f) That with respect to the Sixth Claim, this Court award plaintiffs Two Hundred Million ($200,000,000.00) Dollars in damages; and

(g) That this Court order such other and further relief as it may deem proper.

DATED: September 17, 1979.

BOOTH, LIPTON & LIPTON

BELLI & CHOULOS

By: _____
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APPENDIX G

O'MELVENY & MYERS

March 2nd 1982

631,480-238

The Honorable Davis R. Robinson
Legal Advisor
Department of State
Washington, D.C. 20520

Dear Mr. Robinson:

We are counsel to Occidental Petroleum Corporation in a private antitrust suit now pending before the United States Court of Appeals for the Ninth Circuit, Clayco Petroleum Corp. v. Occidental Petroleum Corp., No. 80-5657. In connection with consideration of Clayco's appeal, the Court of Appeals has asked us for supplemental briefing on a series of questions related to enforcement of the anti-bribery provisions of the Foreign Corrupt Practices Act ("FCPA").

In response to the Court's questions, it will be important for us to discuss the extent to which the Justice Department and the SEC coordinate their enforcement activities under the FCPA with the Department of State. Based upon our conversations with Jeff Smith, Assistant Legal Advisor, and others, it is our understanding that the Departments of State and Justice have adopted a practice under which the Justice Department notifies the State Department in advance of taking any public action, civil or criminal, to enforce the FCPA. As we understand it, this policy is intended to serve two purposes: to give the State Department the opportunity to notify the affected foreign

government in advance of any enforcement action, and thereby minimize any resulting strains on our foreign relations; and to give the State Department the opportunity to raise with the Justice Department any foreign relations concerns that it may have about the wisdom of a particular enforcement action before that action is brought. We understand that the State Department is similarly consulted in connection with SEC enforcement actions under the FCPA.

We are not aware of any published document which adequately describes these FCPA enforcement policies. In order to be sure that our facts are accurate and that we have the correct information in a form which we may present to the Court of Appeals, we would appreciate it if you could provide us with a description and explanation of the practice of notification and/or consultation with the State Department followed by the Justice Department and the SEC in advance of bringing any FCPA enforcement action, and the purposes served by these policies.

Our brief is due in the Court of Appeals on March 22, and will necessarily have to be completed several days before that in order to be printed. Your prompt attention to our request would be greatly appreciated.

Very truly yours

Philip F. Westbrook
of O'MELVENY & MYERS

PFW:lc

cc: Jeffrey H. Smith, Esq.
Assistant Legal Advisor

DEPARTMENT OF STATE

Washington, D.C. 20520

March 18, 1982

Mr. Philip F. Westbrook
O'Melveny & Meyers
611 West Sixth Street
Los Angeles, CA 90017

Dear Mr. Westbrook:

The Legal Adviser has asked that I reply to your letter to him of March 2, 1982 concerning coordination between the Department of State, the Department of Justice and the Securities and Exchange Commission (the "SEC") with respect to enforcement activities under the bribery provisions of the Foreign Corrupt Practices Act of 1977 (the "FCPA").

The Department of State's role in the coordination process does not appear in detail in any published document. It is the practice of the Justice Department, whenever possible, to notify the State Department in advance of taking any public enforcement action under the FCPA. The Justice Department also notifies the State Department when it becomes aware of impending actions by others which may result in premature public disclosure of information relating to an active FCPA investigation or prosecution.

This practice is intended to serve two purposes: first, to give the State Department the opportunity to notify, if appropriate, the affected foreign government in advance of any enforcement action or other action which might result in public disclosure; and, second, to give the State Department an opportunity to inform the Justice Department of the foreign relations context in which the enforcement action arises.

The State Department is generally notified in a similar manner with regard to cases involving the SEC's civil enforcement authority under the FCPA.

I trust this information will be helpful.

Sincerely yours,

Daniel W. McGovern
Deputy Legal Adviser

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